

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:09-CR-262 JCM (GWF)

Plaintiff(s),

ORDER

v.

ALFONSO RIVERA-AVALOS, et al.,

Defendant(s).

Presently before the court is petitioner Juan Rodriguez’s motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. (ECF No. 387). The United States of America (“the government”) filed a response (ECF No. 397), to which petitioner replied (ECF No. 401).

I. Background

In April 2014, petitioner was sentenced to five years in custody for conspiracy to distribute methamphetamine, possession of a firearm in furtherance of a drug trafficking crime, and being a felon in possession of a firearm following a guilty verdict in a jury trial. (ECF No. 213). After an appeal that affirmed the conviction but vacated the sentence, this court resentenced petitioner to 180 months in prison on the same counts. (ECF No. 310).

After petitioner’s conviction, the Supreme Court decided *Rehaif v. United States*. 139 S. Ct. 2191 (2019). In *Rehaif*, a defendant—a foreign student who overstayed his visa and was unaware of his illegal status—successfully challenged his conviction for possessing a firearm. *Id.* at 2194–95. After *Rehaif*, to obtain a conviction under 28 U.S.C. §922(g), the government “must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” *Id.* at 2200. “For example, in a

1 felon-in-possession prosecution under § 922(g)(1), the defendant must know that his or her prior
 2 conviction was punishable by more than one year of imprisonment.” *United States v. Singh*, 979
 3 F.3d 697, 727 (9th Cir. 2020). Petitioner now moves to vacate his conviction under 28 U.S.C. §
 4 2555 in light of *Rehaif*. (ECF No. 387).

5 **II. Legal Standard**

6 Federal prisoners “may move . . . to vacate, set aside or correct [their] sentence” if the court
 7 imposed the sentence “in violation of the Constitution or laws of the United States . . .” 28 U.S.C.
 8 § 2255(a). Section 2255 relief should be granted only where “a fundamental defect” caused “a
 9 complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also Hill*
 10 *v. United States*, 368 U.S. 424, 428 (1962).

11 Limitations on § 2255 motions are based on the fact that the movant “already has had a fair
 12 opportunity to present his federal claims to a federal forum,” whether or not he took advantage of
 13 the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 “is not designed
 14 to provide criminal defendants multiple opportunities to challenge their sentence.” *United States*
 15 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

16 “When a defendant has raised a claim and has been given a full and fair opportunity to
 17 litigate it on direct appeal, that claim may not be used as basis for a subsequent § 2255 petition.”
 18 *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000). Further, “[i]f a criminal defendant
 19 could have raised a claim of error on direct appeal but nonetheless failed to do so,” the defendant
 20 is in procedural default. *Johnson*, 988 F.2d at 945; *see also Bousley v. United States*, 523 U.S.
 21 614, 622 (1998).

22 Defendants who fail to raise an issue on direct appeal may later challenge the issue under
 23 § 2255 only if they demonstrate: (1) sufficient cause for the default; and (2) prejudice resulting
 24 from it. *See Bousley*, 523 U.S. at 622. The “cause and prejudice” exception revives only defaulted
 25 constitutional claims, not nonconstitutional sentencing errors. *United States v. Schlesinger*, 49
 26 F.3d 483, 485 (9th Cir. 1994).

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1 **III. Discussion**

2 *a. Jurisdiction*

3 An indictment must sufficiently charge an “offense[] against the laws of the United States.”
 4 18 U.S.C. § 3231; *see also United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003). Yet the
 5 Supreme Court in *United States v. Cotton* held that “defects in an indictment do not deprive a court
 6 of its power to adjudicate a case.” 533 U.S. 625, 630 (2002). A claim that “the indictment does
 7 not charge a crime against the United States goes only to the merits of the case.” *Id.* at 630–31
 8 (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916)). The Ninth Circuit has since held that
 9 an indictment’s omission of a knowledge of status element does not deprive the court of
 10 jurisdiction. *See, e.g., United States v. Espinoza*, 816 F. App’x 82, 84 (9th Cir. 2020); *United*
 11 *States v. Velasco-Medina*, 305 F.3d 839, 845–46 (9th Cir. 2002). Thus, the court rules that it did
 12 not lack jurisdiction despite the indictment not charging the *Rehaif* knowledge element.

13 *b. Procedural Default*

14 A claim not raised on direct appeal is procedurally defaulted and can only be raised in a §
 15 2255 motion if the petitioner can show cause and actual prejudice or actual innocence. *See*
 16 *Bousley*, 523 U.S. at 622. “[W]here the claim rests upon a new legal or factual basis that was
 17 unavailable at the time of direct appeal,” a petitioner has cause for failure to raise the claim on
 18 direct appeal. *Braswell*, 501 F.3d at 1150. Actual prejudice requires the petitioner to show “not
 19 merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his
 20 *actual* and substantial disadvantage, infecting his entire trial with error of constitutional
 21 dimensions.” *Frady*, 456 U.S. at 170.

22 Petitioner has shown cause because *Rehaif* “overturn[ed] a longstanding and widespread
 23 practice to which [the] Court has not spoken, but which a near-unanimous body of lower court
 24 authority has expressly approved.” *Reed v. Ross*, 468 U.S. 1, 17 (1984). But petitioner cannot
 25 show actual prejudice.

26 At trial, petitioner stipulated that at the time of the conduct underlying the instant
 27 conviction he had previously been convicted of a felony. (ECF No. 185 at 2). It is implausible
 28 that petitioner did not know he was a convicted felon. *Accord United States v. Beale*, No. 2:17-

1 cr-00050-JAD-CWH-1, 2021 WL 325713, at 3 (D. Nev. Feb. 1, 2021) (“Beale must still show
 2 ‘actual prejudice’ to excuse his default. Beale can’t do so with a criminal record and sentencing
 3 history like his.”); *United States v. Lowe*, No. 2:14-cr-00004-JAD-VCF, 2020 WL 2200852, at *1
 4 n.15 (D. Nev. May 6, 2020) (collecting cases in which defendants’ prior felony convictions
 5 precluded a finding of actual prejudice). “Felony status is simply not the kind of thing that one
 6 forgets.” *United States v. Greer*, 141 S. Ct. 2090, 2100 (2021).

7 In addition, the court will not rule that *Rehaif* error is a structural error that excuses
 8 petitioner from showing actual prejudice. That is because structural errors are a very limited class
 9 of errors that affect the framework within which the trial proceeds, such that it is often difficult to
 10 assess the effect of the error. *See United States v. Marcus*, 560 U.S. 258, 263 (2010). And ruling
 11 otherwise would be imprudent based on the Ninth Circuit’s treatment of *Rehaif* in different
 12 contexts.

13 For example, in *Tate v. United States*, the Ninth Circuit held that *Rehaif* was a statutory
 14 interpretation case and “did not invoke any constitutional provision or principle” that could sustain
 15 a successive § 2255 motion. *Tate v. United States*, 982 F.3d 1226, 1228 (9th Cir. 2020). And in
 16 *United States v. Benamor* and *United States v. Johnson*, the Ninth Circuit did not treat *Rehaif* error
 17 as structural and instead conducted plain-error review and held that the error did not affect the
 18 defendants’ substantial rights or the fairness, integrity, or public reputation of the judicial
 19 proceedings. *United States v. Johnson*, 833 F. App’x 665, 668 (9th Cir. 2020); *United States v.*
 20 *Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 818 (2020).

21 And after all, the *Rehaif* court itself remanded the case for harmless error review rather
 22 than automatically reversing the conviction. S. Ct. at 2200. For these reasons, the court will not
 23 excuse petitioner’s failure to show actual prejudice.

24 **c. Certificate of Appealability**

25 The right to appeal a court’s denial of a § 2255 motion requires a certificate of
 26 appealability. To obtain such a certificate, the petitioner must make a “substantial showing of the
 27 denial of a constitutional right.” 28 U.S.C. § 2253(c). That is, “[t]he petitioner must demonstrate
 28 that reasonable jurists would find the district court’s assessment of the constitutional claims

1 debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221
2 F.3d 1074, 1077–79 (9th Cir. 2000). Based on this standard and the almost uniform treatment of
3 post-*Rehaif* § 2255 motions in this district, the court denies petitioner a certificate of appealability.

4 **IV. Conclusion**

5 Accordingly,

6 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner’s motion
7 pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (ECF No. 387) be, and the
8 same hereby is, DENIED.

9 The clerk is directed to enter separate civil judgment denying petitioner’s § 2255 motion
10 in the matter of *Rodriguez v. United States*, case number 2:20-cv-01151-JCM, and close that case.

11 DATED October 21, 2022.

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14 UNITED STATES DISTRICT JUDGE
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